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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA Plaintiff, vs. STEVEN CARROLL DEMOCKER, Defendant.	No. P1300CR20081339 Division 6 **DEFENDANT'S MEMORANDUM ON ADMISSIBLITY OF EXPERT REPORTS**

Pursuant to Rules 5, 13.5, 15, and 16 of the Arizona Rules of Criminal Procedure, due process, and the Arizona and U.S. Constitutions, Defendant Steven DeMocker hereby submits this Memorandum to the Court regarding the admissibility of expert reports at the hearing pursuant to *Chronis v. Steinle*, 220 Ariz. 559, 208 P.3d 210 (2009).

MEMORANDUM OF POINTS AND AUTHORITIES

BACKGROUND

On August 25, 2009, Mr. DeMocker filed a Motion to Dismiss the Death Penalty Notice for Lack of Probable Cause or, in the Alternative, for a Probable Cause Hearing

on the State's Noticed Aggravating Circumstances. On September 22, 2009 this Court set an evidentiary hearing and oral argument for a *Chronis* hearing for October 20, 2009.

ARGUMENT

The Arizona Supreme Court in *Chronis* held that Arizona Rule of Criminal Procedure 13.5(c) permits a defendant in a capital murder case to request a determination of probable cause as to alleged aggravating circumstances. *Id.* Having concluded that such probable cause hearings are appropriate, the Court held that Arizona Rule of Criminal Procedure 5 applies to the hearing. *Id.* at 562. "[T]he proper procedure to be followed is generally described in Arizona Rule of Criminal Procedure 5." *Id.* The Court explained "[a]s in all Rule 5 proceedings, the burden of proof rests on the State to prove that probable cause exists as to the aggravating circumstance." *Id.* The court also noted that "a court will admit only evidence that is material to the question whether probable cause exists, and the judge may consider evidence without regard to any motions to suppress, and may consider certain forms of hearsay. *Id.* citing Ariz. R. Crim. P. 5.3 (a) and (b) and 5.4(c) (internal citations omitted). Finally, the Court cautioned that a prosecutor has an ethical obligation to have probable cause at the time he alleges a specific aggravator. "Prosecutors are ethically bound not to allege aggravating factors that they know are not supported by probable cause." *Id.* citing Ariz. Sup.Ct. R. 42, ER 3.8(a).

Probable cause must be based on "substantial evidence" which may include hearsay in the form of "written reports of expert witnesses." Ariz. R. Crim. P. 5.4 (c)(1). Rule 702, Arizona Rules of Evidence, provides that an expert may testify about a matter of "scientific, technical or other specialized knowledge" that will assist the trier of fact to understand the evidence or to determine a fact in issue. Ariz. R. Ev. 702. "The Rules of Evidence, and Rule 702 itself, erect barriers to admission of all opinion evidence: the evidence must be relevant, the witness must be qualified, and the evidence

must be the kind that will assist the jury." *Logerquist v. McVey,* 196 Ariz. 470, 489, ¶ 57, 1 P.3d 113, 132 (2000). Rule 702 permits a qualified witness to testify in the form of an opinion if it would assist the trier of fact to understand the evidence or determine a fact in issue. Ariz. R. Ev. 702; *Gemstar Ltd. v. Ernst & Young,* 185 Ariz. 493, 505, 917 P.2d 222, 234 (1996) (stating trial court has broad discretion when determining whether a witness is competent to testify as an expert).

I. Expert Testimony Must be of Scientific, Technical, or Other Specialized Knowledge.

Expert testimony is inadmissible if it concerns factual issues that are within the knowledge and experience of ordinary lay people. Conversely, expert testimony is permitted only when the subject is beyond the common experience of most people and where the opinion of an expert will assist the trier of fact. If a matter for expert testimony is of such common knowledge that a person of ordinary education and background could reach as intelligent a conclusion as an expert, the testimony should be precluded. *State v. Williams*, 132 Ariz. 153, 160, 644 P.2d 889, 896 (1982). Expert opinions will be rejected where facts can be intelligently described to and understood by jurors so that they can form reasonable opinions for themselves. *Shell Oil Co. v. Gutierrez*, 119 Ariz. 426, 434, 581 P.2d 271, 279 (Ariz. App. 1978). The test "is whether the subject of inquiry is one of such common knowledge that people of ordinary education could reach a conclusion as intelligently as the witness ...." *State v. Chapple*, 135 Ariz. 281, 292, 660 P.2d 1208, 1219 (1983) (citing *State v. Owens,* 112 Ariz. 223, 227, 540 P.2d 695, 699 (1975)).

II. An Expert Must Be Qualified as an Expert About the Subject Matter of His Opinions.

"[T]he trial court determines in each case 'whether the expertise of the witness is applicable to the subject about which he offers to testify.'" *Gemstar,* 185 Ariz. at 505, 917 P.2d at 234 (quoting *Englehart v. Jeep Corp.,* 122 Ariz. 256, 258, 594 P.2d 510,

512 (1979)). To qualify to testify as an expert witness, the witness must possess expertise that is applicable to the subject about which he intends to testify, and he must have training or experience that qualifies him to render opinions which will be useful to the trier of fact. *Webb v. Omni Block, Inc.*, 216 Ariz. 349, 166 P.3d 140 (Ariz. App. 2007). The party offering expert testimony must show that the witness is competent to give an expert opinion on the precise issue about which he is asked to testify. *Gaston v. Hunter*, 121 Ariz. 33, 51, 588 P.2d 326, 344 (Ariz. App. 1978). An expert will be excluded if he (1) has no relevant training or experience, (2) does not detail the basis for his opinions and conclusions, and (3) does not establish that his opinions and conclusions were based on data that was reasonably relied upon by experts in the field. *Holy Trinity Greek Orthodox Church v. Church Mut. Ins. Co.*, 476 F.Supp.2d 1135 (D. Ariz. 2007) (witness did not qualify as expert, for purposes of giving an affidavit in opposition to summary judgment in bad faith case against property insurer regarding insurance claims handling practices).

1. Richard Echols' Report Is Not An Expert Report Under Rule 702 and Should be Excluded.

Mr. Echols' report does not concern scientific, technical or other specialized knowledge that would assist a trier of fact and it offers a range of opinions far outside the scope of Mr. Echols' purported expertise.

Mr. Echols is employed by the Rocky Mountain Information Network as a fraud analyst and began working on this case by at least September 5, 2008. (Bates 000582). On December 15, 2008 he identified documents needed to complete his evaluation based almost entirely on the report of John Casalena, CPA. (Bates 02447-8). In early March 2009, Detective Steve Page provided Mr. Echols with Evidence item 458, a jump drive taken from Mr. DeMocker's home during a July 2008 search. (Bates 006793). On September 29, 2009, the State provided Mr. DeMocker with a report from Mr. Echols. (Bates 10600-03).

Mr. Echols provides that he was "asked to assist in the evaluation of the financial records, their impact on the divorce proceedings, and the possible financial motivation that could have led to Carol Kennedy's death." His report addresses three issues: the "book of business," "2007 tax returns," and "documents filed." Although the report states that records "will be referred to in our evaluation in specific detail," not a single document is identified in the report by date, Bates number, location of recovery, or otherwise. Likewise, although the scope of work was described as above, Mr. Echols' report includes opinions and conclusions, not about the financial records, but rather about a range of issues he has no qualifications for nor foundation to support. The opinions in his report include legal conclusions about Mr. DeMocker's behavior that are contrary to Ms. Kennedy and her divorce lawyer's conclusions, about Mr. DeMocker's "understandings" of matters in the divorce proceedings, about Carol Kennedy's feelings, and about the nature and quality of the relationship between Mr. DeMocker and Ms. Kennedy. This report should be excluded as failing to qualify as an expert report under Rule 702 and a common sense understanding of the role of experts in cases such as this.

Mr. Echols' conclusions about the following are clearly outside the scope of his expertise:

- His opinion about the effect of the 2007 tax filing on the relationship between Ms. Kennedy and Mr. DeMocker in May 2008. This opinion also fails to acknowledge the obvious impact of the divorce settlement on the day of trial;
- His conclusion that a confrontation between Mr. DeMocker and Ms. Kennedy was "set up" for July 2, 2008;
- His "final analysis" opinions about the relationship between Mr. DeMocker and Ms. Kennedy, calling the relationship "very strained," commenting on emails between Ms. Kennedy and her daughter,

opining about how Ms. Kennedy felt about her divorce attorney and other allegations throughout the divorce;

- Opining that correspondence between Mr. DeMocker and Ms. Kennedy, again without identifying any of it by date, Bates number or otherwise, is "significant and telling;" and
- Legal conclusions that Mr. DeMocker committed perjury and the likelihood of Mr. DeMocker being "found guilty."

Further, Mr. Echols' conclusions about the following are not based on scientific, technical or other specialized knowledge:

Mr. Echols opines that "Mr. DeMocker clearly understands the value of his book of business" and then draws a legal conclusion that Mr. DeMocker "submitted fraudulent statements to the Court under penalty of perjury by not listing the value of his 'book of business.'" Mr. Echols does not identify by date or Bates number or any other reference this document that was allegedly submitted under "penalty of perjury."[1] Mr. Echols is not a legal expert.

Next, Mr. Echols opines that Mr. DeMocker had his 2007 return prepared using figures he knew to be false and that this was presented to him by "Carol, Mr. Fruge, and Ms. Wallace on several occasions."[2] Mr. Echols does not identify how, which figures, or by what amount these figures were "false." Mr. Echols refers to no financial documents, although the State has subpoenaed and received thousands of pages of Mr. DeMocker's financial documents.

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[1] Mr. Echols also fails to include substantial relevant information on this subject including: that it is a court's job to determine whether a book of business existed and, if it did, whether it was a marital asset subject to division or not; that an Arizona court had never considered the issue of a book of business or its value as a community asset; Mr. Fruge's explanation to the State that the court would in most cases not consider a false financial sheet in a divorce proceeding a violation of the court; and Mr. Casalena's report to Mr. Echols that Ms. Kennedy had concluded that the "book of business" argument would not be successful with the court and that part of the reason for the divorce settlement was that she thought $6,000 a month in alimony was more than she would receive from the court at a trial.

[2] No direct communication between Ms. Wallace and Mr. DeMocker has been disclosed to the defense.

Finally, Mr. Echols' hyperbolic speculation is not based on any expertise. His speculation that certain events that did not occur would lead to "Mr. DeMocker losing his license to sell securities, and therefore everything he had would be lost, including his ability to produce the revenue he had been earning" is not based on scientific, technical or other specialized knowledge. This kind of rampant speculation concludes that Mr. DeMocker "stands to lose all that he has." Finally, in another conclusion having nothing to do with Mr. Echols' asserted financial expertise, he declares that, "the resultant consequences are disastrous."

Expert testimony on the question of whom to believe is nothing more than advice to the trier of fact on how to decide the case. Such testimony was not legitimized by Rule 704, and is not admissible under Rule 702. The same principle applies to expert opinion testimony on whether the crime occurred, whether the defendant is the perpetrator, and like questions. *See State v. Moran,* 151 Ariz. 378, 383, 728 P.2d 248, 253 (1986); *see also State v. Montijo,* 160 Ariz. 576, 774 P.2d 1366 (Ariz. App. 1989). An expert's belief in a witness's credibility "has never been a permissible subject of expert opinion less the trial process return to the discredited notion of marshalling adherents of either side as oathtakers." *Moran,* 151 Ariz. at 383, 728 P.2d at 253, citing M. UDALL & J. LIVERMORE, LAW OF EVIDENCE § 22, at 30-31 (2d ed. 1982).

Mr. Echols' report is full of opinions he is not qualified to offer and conclusions that are not properly the subject of expert testimony. Both a jury and the court are able to draw conclusions based on the evidence, and Mr. Echols' rank speculation, hyperbole and unsupported legal conclusions are of no assistance to anyone. Mr. Echols' report is not helpful to the trier of fact and should be excluded.

2. Dr. Keen's Opinion

Dr. Phillip Keen performed an autopsy on Ms. Kennedy on July 3, 2008. He ruled Ms. Kennedy's death a homicide resulting from "multiple blunt force craniocerebral injuries." (Bates 000552-61). The autopsy report offers no opinion as to

order of infliction of the blunt force trauma. It also notes that there are two "patterned contusions whose location and appearance are consistent with defensive injuries." This report was first disclosed in November of 2008. The three pages of diagrams from Keen's report were disclosed on April 27, 2009. (Bates 003646-48).

On September 29, 2009, defense counsel were provided with one paragraph on a blank page, with no identification of the author or agency, purporting to be a summary report of a conversation with Dr. Keen and alleging that an audiotape of the conversation was not properly recorded. (Bates 010599). This report was re-disclosed on October 5, 2009 as a supplemental report from Detective McDermott. (Bates 010629). The report states that Detective McDermott was directed on September 16, 2009 to speak to Dr. Keen regarding the (f)(6) aggravator.[3] The report further states that Detective McDermott then spoke with Dr. Keen on September 21, 2009 who advised that "the violence was gratuitous and had elements of torture." According to McDermott, Keen then went on to opine, without explanation, that defense wounds "showed she was aware, alert and conscious of the attack and felt the pain in at least the early stage of the attack." Keen also opinioned that this was a clubbing death that was "excessive."

These opinions are not found in Dr. Keen's autopsy report nor are they substantiated. In fact, this information is inconsistent with Dr. Keen's autopsy report and findings, wherein he notes only two injuries consistent with defensive wounds and makes no reference to torture. The autopsy report does not identify in what order any injuries were inflicted, nor does it allege when or based on what injury Ms. Kennedy was rendered unconscious.

Although hearsay may be admissible at a Rule 5 hearing in certain circumstances, Mr. DeMocker does have a Sixth and Fourteenth Amendment

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[3] Note that this aggravating factor was noticed on June 29, 2009, long after the time frame for notification under Ariz. R. Crim. P. 15.1, but nonetheless almost three months before the State sought the opinion of Keen, and with the only evidence at the time it was noticed being two injuries consistent with defensive wounds.

confrontation right. The Confrontation Clause "ensure[s] that testimony of an out-of-court declarant may be given only where it is invested with 'particularized guarantees of trustworthiness.' " *State v. Bass,* 198 Ariz. 571, 580, ¶ 35, 12 P.3d 796, 805 (2000) (quoting *Ohio v. Roberts,* 448 U.S. 56, 66, 100 S.Ct. 2531 (1980)). "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v. Craig,* 497 U.S. 836, 845, 110 S.Ct. 3157, 3163 (1990). Given that Dr. Keen's "opinion" appears to have changed recently, is not contained in any report and also conflicts with his earlier conclusions, Mr. DeMocker's right to confront the evidence against him in support of the (f)(6) aggravating factor can only properly be preserved by counsel's ability to cross-examine Dr. Keen directly. For this reason, Detective McDermott should not be permitted to testify regarding Dr. Keen's alleged opinions regarding the (f)(6) aggravator.

CONCLUSION

For these reasons, Mr. DeMocker requests that this Court exclude the expert report of Mr. Echols and permit Dr. Keen's opinions only through his direct testimony.

DATED this 19th day of October, 2009.

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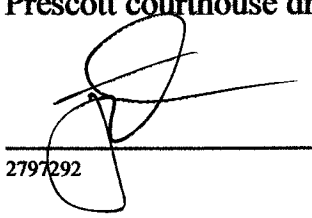

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